

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

Civil Revision Application No.199 of 2013

- 1) Shankarlal Ramsay Sharma (Marwadi)
Age 72 years,
Occupation : Business
R/o At Post Dondaicha,
Taluka Shindkhed, District Dhule.
- 2) Tarachand Ramsay Sharma (Marwadi)
Since deceased through legal
representatives:
 - 2A) Shakuntalabai W/o Tarachand Sharma
(Marwadi), Age 58 years,
Occupation : Household.
 - 2B) Dinesh Tarachand Sharma (Marwadi)
Age 32 years, Occupation : Business.
 - 2C) Ritesh Tarachand Sharma (Marwadi)
Age 28 years,
Occupation : Private Service.
2A to 2C - R/o At Post Dondaicha,
Taluka Shindkheda, District Dhule.
 - 2D) Sangita Shivkumar Rajoriya,
Age 27 years,
Occupation : Household,
R/o Ramnagar, Buldhana,
District Buldhana.
 - 2E) Vinita Vijaykumar Sharma,
Age 35 years,
Occupation : Household,
R/o. Sendhava, Near Killa,
Taluka Sendhava,
District Khargon (M.P.)

- 3) Tarabai Maganlal Sharma,
Age 74 years,
Occupation : Household,
R/o Gopalpura, Dondaicha,
Taluka Shindkheda,
District Dhule.

.. Petitioners.

Versus

- * Sushilabai Govindlal Wani,
Age 72 years,
Occupation : Household,
R/o Sushila Sadan,
Sonar Galli, Dondaicha,
Taluka Shindkheda, District Dhule. **.. Respondent.**

Shri. S.P. Shah, Advocate, holding for Shri. Manish V.
Bhamre, Advocate, for petitioners.

Shri. S.P. Brahme, Advocate, for respondent.

CORAM: T.V. NALAWADE, J.

DATE : 4th AUGUST 2015

JUDGMENT:

- 1) The revision is filed to challenge the judgment and decree of Regular Civil Suit No.133/2003 which was pending in the Court of the Civil Judge, Junior Division, Dondaicha, District Dhule and also the judgment and decree of Civil Appeal No.137/2008 which was pending in the Court of the Principal District Judge, Dhule. The decree of recovery of possession of property used for

commercial purpose is given by the trial Court on the ground of non-user which falls under section 16(1)(n) of the Maharashtra Rent Control Act, 1999. The District Court has dismissed the appeal filed by the tenant. Both the sides are heard.

2) The property involved is Survey Nos.3616 and 3814 on which there is some construction and there is some open space. This property is given number in municipal record and it is situated at Dondaicha-Warwade, Tahsil Shindkheda, District Dhule.

3) It is the case of the plaintiff that suit property was given to the defendants for running business of Dal-Mill. It is contended that for last many years the defendants are not doing the said business in the property and the property is not in use. It is contended that as per agreement the property cannot be used for any other purpose or other business.

4) The plaintiff had filed the suit on the ground of default also by contending that since the year 1992 the

defendants had not paid any rent. Decree is not given on this ground and so there is no need to discuss the evidence and rival contentions on this point.

5) The plaintiff prayed for relief of possession on the ground that for more than six months immediately preceding the date of institution of the suit the defendants had not used the suit property for the purpose for which it was let. The suit was filed on 3-9-2002.

6) The defendants filed joint written statement. They contended that there is no cause of action for the suit. They, however, admitted that the suit property was given to them for business of Dal-Mill. They denied that they had closed the business and they had not used the suit property continuously for period of six months prior to the date of the suit. They contended that the defendant No.1,2 and husband of the defendant No.3 are in the business of Dal Mil. They contended that the plaintiff wants to develop the property by preparing plots and wants to sell the property and so false suit is brought against the defendants.

7) Many issues were framed by the trial Court. There was the issue of limitation also. The issue regarding non user of the suit property continuously for the period of six months preceding the date of suit for the purpose for which the suit property was given and limitation issue is answered against the defendants. The learned counsel for the tenant argued mainly on the ground of limitation.

8) For proving the case of non user which falls under section 16(1)(n) of the Maharashtra Rent Control Act the plaintiff has examined many witnesses. Power of attorney of the plaintiff has given evidence on aforesaid contention. It is brought on the record in cross-examination that specific year from which the defendants are not using the suit premises is not mentioned in the pleadings. In the proceeding filed for fixation of standard rent he had given evidence that the business was not being done for about 20 years. On the other hand, the defendant No.1 Shankarlal has given evidence that they are still doing the business of Dal-Mill in the suit premises. It appears that he has no record to prove that the defendants are still doing the business of Dal-Mill and

so he tried to give explanation of many kinds. As there is no bill of electricity of the relevant period he tried to say that the machinery was run by using diesel. However, there is no record of use of diesel also. He tried to say that they are using the space for Papad business, the preparation of food articles.

9) The evidence of the defendant in the cross examination shows that he has no account of the business of Dal-Mill. He has no record like licence under the Prevention of Food Adulteration Act or licence in respect of small scale industry.

10) The plaintiff has examined one Bhagwan Borase a Shop Inspector and his evidence shows that as per the record of the local body no business is being done in the suit property. The other witness Ganesh Jadhav is employee of the MSEB and his evidence shows that in the name of the defendants no connection of electricity is given by the MSEB in the suit premises for any purpose.

11) The aforesaid evidence and the admission given by the defendant No.1 during his evidence are sufficient to infer that they are not doing any business in the suit premises and the case falls under the aforesaid provision of the Maharashtra Rent Control Act. The aforesaid material is considered both by the trial Court and the appellate Court and the decision on the ground of non user is taken on the basis of the aforesaid material. Learned counsel for the landlord placed reliance on some reported cases and submitted that considering the scope of the revision filed under section 115 of the Civil Procedure Code 1908 it is not possible to interfere in the finding given by the Courts below which is concurrent finding on aforesaid point. This proposition cannot be disputed. On the point, cases reported as (1) **AIR 1973 SC 76 (Managing Director (Mig) Hindustan Aeronautics Limited v. Ajit Prasad)**; (2) **AIR 1991 SC 1594 (Chandmal v. Firm Ram Chandra and Vishwanath)**; and (3) **AIR 1998 SC 3325 (Patel Valmik Himatlal v. Patel Mohanlal Muljibhai)** were cited by the learned counsel for the landlord.

12) There cannot be dispute over the propositions made in cases cited supra that interference with the orders of the First Appellate Court and the trial Court is possible only if the orders suffer from material irregularities or the Courts blow exercised its jurisdiction illegally. Provision of section 29(2) of the Bombay Rent Act is also discussed by the Apex Court in the second case cited supra and it is observed that High Court can correct errors which may make decision contrary to law and which errors can go to the root of the decision but the power of revision is not available to re-hear the matter and re-appreciate the evidence. It is laid down that the fact that different view is possible on re-appreciation of evidence cannot be a ground for exercise of revisional jurisdiction. In view of this position of law and aforesaid facts and circumstances, this Court holds that interference in the finding of aforesaid fact is not permissible.

13) The learned counsel for the tenant vehemently argued the ground of limitation. He submitted that it is duty of the Court to ascertain that the suit is filed within

limitation in view of provision of section 3(1) of the Limitation Act and such point needs to be decided by the Court when there is doubt about it. There cannot be any dispute over this proposition. Learned counsel for the tenant then submitted that in view of the pleadings, the Court ought to have held that cause of action for the suit on the aforesaid ground had arisen more than 12 years prior to the date of the suit and so in view of Article 66 of Limitation Act, the trial Court ought to have held that the suit is not within limitation. He placed reliance on one case of this Court reported as **2010 (5) Mh.L.J. 527 (Shashikant vs. Chintaman)**. Reliance is placed on other case like **(2008) 12 SCC 577 (Kamlesh Babu v. Lajpat Rai Sharma)** and it was submitted that the issue of limitation needs to be decided even in the High Court in second appeal in view of provision of section 3(1) of Limitation Act.

14) There cannot be any dispute over the propositions made by this Court and the Apex Court in the cases cited supra. In the first case, this Court was considering a suit filed by the landlord under section 13(1)

(l) of the Bombay Rent Act, for possession on the ground that tenant had acquired suitable residential premises and had started residing therein since long. It is observed that under section 13(1)(l) of the Bombay Rent Act tenant forfeited this protection and right to retain the possession of tenanted premises after he acquired suitable residence. It is observed that the forfeiture takes place on the date on which the tenant acquired suitable residential premises and so the period of limitation will be required to be counted from the date of forfeiture i.e. the date of acquisition of the suitable residential premises. The facts of this reported case show that alternate accommodation was acquired by the tenant in the year 1970-71 and the suit was filed in April 1987. In view of the facts of that case the Court held that the suit was not within limitation. It was held that in such a case Article 66 of Limitation Act would apply.

15) The facts of the present matter are altogether different. The pleadings of the plaintiff show that he had vaguely contended that for many years the defendants were not using the suit premises. The defendants have

come with specific case that they have been using the premises. In the evidence, the defendant No.1 contended that they were using the machine on diesel also and they have no record only respect of about 10 years preceding the date of suit.

16) In view of the aforesaid pleadings and the wording of section 16(1)(n) of the Act the Courts below have observed that the suit is within limitation. Provision of section 16(1)(n) runs as under :-

"16. When landlord may recover possession (1)

Notwithstanding anything contained in this Act but subject to the provisions of section 25, a landlord shall be entitled to recover possession of any premises if the court is satisfied --

(n) that the premises have not been used without reasonable cause for the purpose for which they were let for a continuous period of six months immediately preceding the date of the suit. "

17) The aforesaid provision shows that the landlord can file suit only if he is sure that the tenant has not used the premises for the period of six months immediately

preceding the date of suit. The question of limitation is mixed question of law and fact and further the knowledge of the landlord in that regard needs to be considered. Thus in a case like the present one it cannot be said with certainty that on a particular day the tenant practically stopped using the premises for the purpose for which it was given and on particular day the landlord came to know about such non user. Though it is true that initial burden is on the plaintiff to show that the suit is within limitation and for deciding the point of limitation, pleading is required to be first considered, at the time of decision, evidence is also to be considered. As there is no specific case as required by the provision of Limitation Act on the point involved, this Court holds that it is not possible to infer that the suit came to be filed after the period prescribed by Article 66 of the Limitation Act, from the date of cause of action.

18) The question of limitation is mixed question of fact and law. There is concurrent finding of two Courts below on the question of fact viz. since when the property was not in use. This question has relation to provision of

section 16(1)(n) of the Act. The question of fact has relation also to the question of date of knowledge of landlord. When the trial Court and appellate Court have decided this question in favour of landlord, there is not much scope to this Court in present proceeding to interfere in this finding of fact. So, the interference is not possible on the entire question, the question of limitation.

19) In view of the aforementioned facts and circumstances, this Court holds that it is not possible to interfere in the decision given by the trial Court and the District Court. In the result, the revision stands dismissed.

Sd/-
(T.V. NALAWADE, J.)

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